

SERVED: May 17, 1993

NTSB Order No. EA-3884

**UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.**

Issued under delegated authority (49 C.F.R. 800.24)
on the 17th day of May, 1993

REOPENING TO CONSIDER SUPPLEMENTAL
CLAIMS UNDER THE EQUAL ACCESS TO
JUSTICE ACT AND REVISED RULES AT
49 C.F.R. 826.6

Dockets 135-EAJA-SE-10562
149-EAJA-SE-12360
101-EAJA-SE-10865
156-EAJA-SE-12735
130-EAJA-SE-12106
130-EAJA-SE-12107
137-EAJA-SE-11543
158-EAJA-SE-12837
150-EAJA-SE-12564
124-EAJA-SE-11924
152-EAJA-SE-12456
68-EAJA-SE-7871
69-EAJA-SE-8302
71-EAJA-SE-9263

ORDER

In its Notice of Proposed Rulemaking (NPR) in Equal Access to Justice Act Fees, 57 FR 60785 (December 22, 1992), the Board granted a number of petitions seeking the application of a cost-of-living inflator to the \$75 fee cap contained in 49 C.F.R. 826.6. The Board has since adopted the proposed rules, which contain an annual consumer price index inflator, beginning with 1981. Id., 58 FR 21543 (April 22, 1993).


In adopting the new rules, the Board indicated that it would apply the newly adopted index to pending applications. By this order, applicants in the above cases are given the opportunity to file supplemental requests. Any such requests must contain the

information required by § 826.6(c) , so that the Board may make the required affirmative findings.¹ Any request shall also contain the necessary year-by-year calculations under the new rule.² The opportunity provided here is procedural only. That is, no intimation on the merits of any application is intended, and the Board retains the right to grant, modify or deny any of the awards at issue.³

ACCORDINGLY , IT IS ORDERED THAT:

1. Applicants in the above numbered cases may, within so days from the date of this order, file supplemental petitions under new § 826.6(b)(1). Any petition shall contain the information described in this order; and

2. All such petitions shall be served on the Administrator, who shall have 30 days to respond.


Daniel D. Campbell
General Counsel

¹At this stage, 49 C.F.R. 826.6(c) requires evidence of the attorney's customary fee for similar services, and the prevailing rate for similar services in the community in which the attorney ordinarily performs services.

²The new rule is reproduced in the appendix to this order.

³If an eligible petitioner fails to file a supplemental brief pursuant to this order, no increase in fees will be considered by the Board.

APPENDIX

§ 826.6 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b)(1) No award for the fee of an attorney or agent under these rules may exceed \$75 indexed as follows:

$$\frac{x}{\$75/\text{hr}} = \frac{\text{CPI-New}}{\text{CPI-1981}}$$

The CPI to be used is the annual average CPI, All Urban Consumers, U.S. City Average, All Items, except where a local, All Item index is available. Where a local index is available, but results in a manifest inequity vis-a-vis the U.S. City Average, the U.S. City Average may be used. The numerator of that equation is 'the yearly average for the year(s) the services were provided, with each year calculated separately. If an annual average CPI for a particular year is not yet available, the prior year's annual average CPI shall be used. This formula increases the \$75 statutory cap by indexing it to reflect

cost of living increases, as authorized in 5 U.S.C. 504(b)(1)(A)(ii). Application of these increased rate caps requires affirmative findings under §821.6(c) of this chapter. For ease of application, available U.S. City figures are reproduced as follows:

1981	90.9
1982	96.5
1983	99.6
1984	103.9
1985	107.6
1986	109.6
1987	113.6
1988	118.3
1989	124.0
1990	130.7
1991	136.2
1992	140.3
1993	144.5

(2) No award to compensate an expert witness may exceed the highest rate at which the agency pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.